Supreme Court, U. S.
FILED
DEC 13 1974
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

BRIEF OF APPELLEE

WILLIAM LEE ALLEN
COUNSEL OF RECORD

HARRY LOUIS SHORSTEIN
COUNSEL

1300 City Hall
Jacksonville, Florida 32202

ATTORNEYS FOR APPELLEE

Certificate of Service

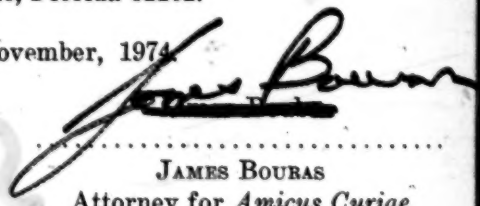
I hereby certify that I have served three copies each of this Brief of Motion Picture Association of America, Inc. as *Amicus Curiae* upon counsel of record for each of the parties by depositing copies of said Brief in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery by air mail.

Copies of this Brief were sent to the following:

Counsel for Appellant: William H. Maness, Esq., 603 Florida Theatre Building, Jacksonville, Florida 32202.

Counsel for Appellee: William Lee Allen, Esq., 1300 City Hall, Jacksonville, Florida 32202.

This 20th day of November, 1974.



.....

JAMES BOURAS
Attorney for *Amicus Curiae*

522 Fifth Avenue
New York, N. Y. 10036

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
QUESTION PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
ARGUMENT	4
Obscenity Test as Inapplicable	6
Nuisance	7
CONCLUSION	12
PROOF OF SERVICE BY SEPARATE INSTRUMENT	12

TABLE OF AUTHORITIES

CASES

Bloss v. Paris Township, 380 Mich. 466, 157 N.W. 2d 260 (1968) 9

Breard v. City of Alexander, 341 U.S. 622, 69 S.Ct. 742, 95 L. Ed. 1233 (1951) 9

Cactus Corporation v. State ex rel. Murphy, 14 Ariz. App. 38, 480 P.2d 375 (1971) 9

Chemline, Inc. v. City of Grand Prairie, 5th Cir. 1966, 364 F. 2d 721 ..... 5, 9

Cinecom Theaters Midwest St. Inc. v. City of Fort Wayne, 7th Cir. 1973, 473 F. 2d 1297 ..... 5, 10, 11

Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) 11

TABLE OF AUTHORITIES (Cont'd)

Page

Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) 10

Hoffman v. Carson, Fla. 1971, 250 So. 2d 891, 49 ALR 3d 1078, app. dismd. 404 U.S. 981 8

Miller v. California, 413 U.S. 15, 93 S.Ct. 9607, 37 L.Ed.2d 419 (1973) 6, 7

Paris Adult Theater I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed. 2d 446 (1973) 6, 7

Rabe v. Washington, 405 U.S. 313, 316, 92 S.Ct. 993, 31 L.Ed. 2d 822 10

Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed. 2d 515 (1967) 9

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957) 9

United States v. Hymans, 10th Cir. 1972, 463 F. 2d 615 7

United States v. One Carton Positive Motion Picture Film, 2d Cir. 1966, 367 F.2d 889 ..... 9, 10

OTHER AUTHORITIES

50 Am Jur 2d Lewdness, Indecency, etc. §16, p. 472 7

Annotation: Drive-In Theater as Nuisance, 93 ALR 2d 1171 9

Schmidt, Attorneys' Dictionary of Medicine 6

Florida Statute 800.03 8

In The
Supreme Court of the United States

OCTOBER TERM 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager
of the University Drive-In Theatre,

Appellant,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

BRIEF OF APPELLEE

CITY OF JACKSONVILLE, FLORIDA, appellee herein, elects not to include items (a), (b) and (c) of Rule 40, however, believes the question presented and statement of the case as submitted by appellant Erznoznik do not properly present the facts or the issues.

QUESTION PRESENTED FOR REVIEW

WHETHER A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FE-

MALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY PUBLIC STREET OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

STATEMENT OF THE CASE

On January 14, 1972, the City of Jacksonville adopted an ordinance declaring certain exhibitions at drive-in theaters to be unlawful and a public nuisance.[1]

---

[1] ORDINANCE 71-752-519

AN ORDINANCE DECLARING CERTAIN EXHIBITIONS AT DRIVE-IN THEATERS TO BE UNLAWFUL AND A PUBLIC NUISANCE; PROVIDING PENALTIES FOR VIOLATION OF ITS PROVISIONS; PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:

330.313 *Drive-In Theaters, Films Visible from Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. USDs 2-5 Excepted.

On March 13, 1972, a summons was served on Erznoznik herein charging him with a violation of the ordinance, and requiring him to appear in municipal court (A-11).

Pursuant to stipulation with the city prosecutor, the municipal court proceedings were continued until disposition of a declaratory judgment action to be brought by Erznoznik (A-6).

Trial of the declaratory judgment action thus instituted was before the court without a jury (A-14 et seq).

The evidence revealed the title of the movie, which was the genesis of the proceedings, to be "Class of '74" (A-17), an "R" rated movie[2]; and that the entire screen was visible from Jack Road, George's Road and in front of the residences on George's Road (A 52-53).

The entire screen was also visible from the parking areas and the recreational area of the Resurrection Catholic Church (A 54-55), as well as residences on Tarpon Court, Moray Court and Marlin Court (A 55-56). People have parked in automobiles to watch movies being shown (A 57-58), and young people have sat in the edge of the woods along the northern boundary to observe movies being shown (A-65).

Final judgment was entered for the City of Jacksonville A-75), on the basis that the ordinance in question was a valid

---

[1]continued.

Section 2. Effective Date. This ordinance becomes effective upon signature by the Mayor or upon becoming effective without the Mayor's signature. (A-13)

[2]See footnote 3 at page 10 of Brief of Erznoznik.

exercise of the police power of the City in regulating nuisances.

On appeal the District Court of Appeal, First District of Florida, affirmed the trial court (A-81), and the Supreme Court of Florida denied certiorari (A-82); hence this appeal.

ARGUMENT

A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FEMALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY STREET OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

The approach of Erznoznik in the trial court was to treat the ordinance in question as invalid as a matter of law; so that the "trial" was sought to be restricted as though it were an argument on a motion for judgment on the pleadings (A-37).

Argument in his brief, however, states:

> "Courts are never foreclosed from inquiring into the legislative findings as nuisances of things that are not so in fact, particularly where municipal ordinances and regulations are in issue.
>
> "The thrust of the judicial inquiry is to determine whether the act or condition sought to be condemned, legislatively, tends to injure the health or to corrupt

the manners and morals of the community."

Erznoznik brief at p. 23

Evidence, both admitted and proffered, at the trial show clearly that:

1. Teenagers congregate on the shoulder of the roadway to watch the movies when "R" rated movies are shown, and scatter litter—beer cans, coca-cola paper cups, trash and broken bottles (A-49).

2. The entire screen can be seen from Jack Road, George's Road, and the residences bordering George's Road (A 52-53).

3. The entire screen can be seen from the parking area and the recreation area of the Resurrection Catholic Church (A-55), and cars have parked next to the Church to observe the screen (A-64).

4. The entire screen can be seen from Tarpon Court, Moray Court and Marlin Court residential aeas (A-55, 56).

5. Young people sit on the ground in the edge of the woods along the northern boundary of the theater to observe the movies (A-65).

6. A resident of the area who lives on George's Lane, and has three minor children, can observe the screen from her house, and it is an embarrassment to her (A-69).

Both *Chemline, Inc. v. City of Grand Prairie*, 5th Cir. 1966, 364 F. 2d 721 and *Cinecom Theaters Midwest St., Inc. v. City of Fort Wayne*, 7th Cir. 1973, 473 F. 2d 1297, recognize that the validity of the ordinance cannot be determined in an evidentiary vacuum. In order to justify the exercise of the police power, the legislation must be supported by some

sound basis of necessity to protect the public morals, health, safety or welfare. The evidence adduced herein clearly supports the "police power" nature of the ordinance.

OBSCENITY TEST AS INAPPLICABLE

As stated by the trial judge herein:

> "The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. . ." (A-78)

Under the guidelines of this court set forth in *Miller v. California*, 413 U.S. 15 (1973) as applied to motion pictures by *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), the ordinance in this case could not stand, because the mere showing of,

> ". . . human male or female bare buttocks, human female bare breasts, or human bare pubic areas[3] . . ." (A-13),

without more, could not be said, to be the showing of,

> ". . . works which taken as a whole, appeal to the prurient interest in sex, whch portray sexual conduct in a patently offensive way, and which, taken as a whole do not have serious literary, artistic, political, or scientific value."
>
> *Miller*, supra, at 413 U.S. 24

---

[3]"Pubic" is defined as: Pertaining to, or located in the region of the sex organs." Schmidt, Attorneys' Dictionary of Medicine (1972 Ed.) page 668.76

But, as stated by this court in *Miller*,

> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. . ."
>
> 413 U.S. at 25

Paris Adult Theater I v. Slaton, supra, did not involve a drive-in theater.

What may be proper or appropriate for showing to adults in an enclosed theater, where they have voluntarily and freely "paid their money and took their choice," can have no relevance to the showing of such films on an outdoor screen visible to the public at large. Nudity is thus magnified and projected several times its normal size; so that if the film were of a "streaker,"[4] the streakor would assume gargantuan proportions as his appearance assaulted the innocent streakees.

> "Indecent exposure—the wilful and intentional exposure of the private parts of one's body in a public place in the presence of an assembly—is an offense at common law. . ."
>
> 50 Am Jur 2d Lewdness, Indecency, etc. §16, p. 472

Thus the convictions of nude bathers in the White River National Forest on a charge of indecent conduct, for swimming in the nude, and sunning themselves on a river bank, while eating watermelon in the nude, was properly upheld. *United States v. Hymans*, 10th Cir. 1972, 463 F. 2d 615.

---

[4]A fad which apparently has fizzled out almost as quickly as "hula hoops."

Certainly if an act itself if done in the flesh can be punished, without any violence being done to the Constitution, films of such act should also be subject to punishment.

If there be no prohibition to the showing of commercial films at drive-in theaters, visible to public streets and public places, of human buttocks, human female breasts, or human pubic areas, then there could be no valid prohibition to showing homemade movies in one's front yard for the edification of the neighbors, or displaying the real thing. Unless, we say that on the one hand the showing of such movies for profit is "speech," and the walking around nude in public places or the showing of homemade movies is "conduct." c.f. *Hoffman v. Carson*, Fla. 1971, 250 So. 2d 891, 49 ALR 3d 1078, app. dismd. 404 U.S. 981, upholding the conviction[5] of a "go-go" dancer for going totally nude and exposing her sex organs in the course of her employment at a Jacksonville, Florida cocktail lounge.

NUISANCE

No citation of authority should be needed for the time-honored proposition that municipalities have the right or, more correctly, the duty to abate a public nuisance.

The judgment of the trial court (A-75) makes it clear that

---

[5]Under Florida Statute 800.03 providing in part:

"It shall be unlawful for any person to expose or exhibit his sexual organs in any public place or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or so to expose or exhibit his person in such place, or to go or be naked in such place."

the decision was based on the police power of the City and more specifically, its power to declare and abate public nuisances. The court cited *Chemline v. City of Grand Prairie*, 5th Cir. 1966, 364 F.2d 721, *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed. 2d 515 (1967) and *Breard v. City of Alexander*, 341 U.S. 622, 69 S.Ct. 742, 95 L. Ed. 1233 (1951) in support of its decision. *Chemline* recognized the police power of the municipality involved.

A leading case, dealing with the operation of an outdoor theater as a nuisance is *Bloss v. Paris Township*, 380 Mich. 466, 157 N.W. 2d 260 (1968) in which the Supreme Court of Michigan held, on facts almost identical to the case at bar, that operation of the theater constituted a public nuisance, and that such course of action did not come within the First and Fourteenth Amendment protections of speech and press. See annotation: Drive-in theater as nuisance, 93 ALR 2d 1171.

See also the excellent opinion of the Court of Appeals of Arizona in *Cactus Corporation v. State ex rel. Murphy*, 14 Ariz. App. 38, 480 P.2d 375 (1971).

In the same vein the comment of Justice Douglas in dissent in *Roth v. United States*, 354 U.S. 476 (1957), that,

> "No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."

354 U.S. at 512

And last, but certainly not least, the decision of *Chemline v. City of Grand Prairie*, 5th Cir. 1966, 364 F.2d 721, upholding an ordinance greatly similar to the Jacksonville ordinance, without, however, including the prohibition against showing the pubic area. *Chemline* was cited with approval in *United*

States v. One Carton Positive Motion Picture Film, 2d Cir. 1966, 367 F.2d 889, 898.

Since, *Cinecom Theaters Midwest St., Inc. v. City of Fort Wayne*, 473 F. 2d 1297, disagrees with *Chemline*, the following comments are in order:

The *Cinecom* decision analyzes the Fort Wayne ordinance as if it were obscenity legislation. Using the "concept of variable obscenity" exemplified in *Ginsburg v. New York*, 390 U.S. 629 (1968), as a measuring rod, the Court finds the ordinance unconstitutional. Variable obscenity is a term that describes the ability to lower the obscenity standard where the matter involved is knowingly directed at a more susceptible group of people such as children. This reasoning is fallacious. It fails to recognize that obscenity is not the cutting edge to be used here. The question before the Court is, are there significant countervailing First Amendment considerations to overcome the city's traditional power to declare a noxious activity a public nuisance? The answer is arrived at by a simple balancing process, and that answer is *NO* where the public's constitutional right of privacy is trampled upon while the theater operator's First Amendment rights are hardly affected at all. The content of the film is not affected. The right of persons to see the film is in no way jeopardized. If people want to seek out nude materials, they may do so. The ordinance merely says it may not be publicly thrust upon them. (See concurring opinion of Chief Justice Burger in *Rabe v. Washington*, 405 U.S. 313, 316 (1972.)

In response to this argument, the Court in *Cinecom* notes that only public places are involved. There was no evidence indicating that the visual presentations were so obnoxious to those walking in the area as to preclude their avoidance simply by averting their eyes; thus substantial privacy inter-

ests were not involved in an essentially intolerable manner. *Cohen v. California,* 403 U.S. 15 (1971). But this finding doesn't comport with the facts in Erznoznik; children playing at the church and on the street could not be expected to keep their eyes averted at all times.

To demonstrate where the *Cinecom* court got off the track we need only cite one innocuous sentence: "As the district judge here recognized, this is not an obscenity case in the *typical* sense." (emphasis added) 473 F.2d 1297, 1301. This is not an obscenity case in *any* sense. Obscenity statutes are constitutional because obscene matter is not considered speech at all; it is outside the purview of the First Amendment. Time, place and manner restrictions on First Amendment rights are only constitutional if they are reasonable; the ordinances in controversy are much more closely akin to noise level ordinances than they are to obscenity laws and they must only meet the reasonableness test and not an obscenity standard. Unfortunately, the similarity of the subject matter causes the issues to be confused.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ERZNOZNIK *v.* CITY OF JACKSONVILLE

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 73–1942. Argued February 26, 1975—Decided June 23, 1975

A Jacksonville, Fla., ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, is facially invalid as an infringement of First Amendment rights. Pp. 3–12.

(a) The ordinance by discriminating among movies solely on the basis of content has the effect of deterring drive-in theaters from showing movies containing any nudity, however innocent or even educational, and such censorship of the content of otherwise protected speech cannot be justified on the basis of the limited privacy interest of persons on the public streets, who if offended by viewing the movies can readily avert their eyes. Pp. 3–7.

(b) Nor can the ordinance be justified as an exercise of the city's police power for the protection of children against viewing the films. Even assuming that such is its purpose, the restriction is broader than permissible since it is not directed against sexually explicit nudity or otherwise limited. Pp. 7–9.

(c) Nor can the ordinance be justified as a traffic regulation. If this were its purpose, it would be invalid as a strikingly underinclusive legislative classification since it singles out movies containing nudity from all other movies that might distract a passing motorist. Pp. 9–10.

(d) The possibility of a narrowing construction of the ordinance appears remote, particularly where appellee city offered several distinct justifications for it in its broadest terms. Moreover, its deterrent effect on legitimate expression in the form of movies is both real and substantial. Pp. 11–12.

288 So. 2d 260, reversed.

Syllabus

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined. WHITE, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–1942

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[June 23, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a challenge to the facial validity of a Jacksonville, Florida, ordinance that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place.

I

Appellant, Richard Erznoznik, is the manager of the University Drive-In Theatre in Jacksonville. On March 13, 1972, he was charged with violating § 330.313 of the municipal code for exhibiting a motion picture, visible from public streets, in which "female buttocks and bare breasts were shown."[1] The ordinance, adopted January 14, 1972, provides:

"330.313 *Drive-In Theaters, Films Visible From Public Streets or Public Places.* It shall be unlawful

[1] The movie, "Class of '74," had been rated "R" by the Motion Picture Association of America. An "R" rating indicates that youths may be admitted only when accompanied by a parent or guardian. See generally Friedman, The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry, 73 Col. L. Rev. 185 (1973). Although there is nothing in the record

> and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense."

Appellant, with the consent of the City Prosecutor, successfully moved to stay his prosecution so that the validity of the ordinance could be tested in a separate declaratory action. In that action appellee, the city of Jacksonville, introduced evidence showing that the screen of appellant's theater is visible from two adjacent public streets and a nearby church parking lot. There was also testimony indicating that people had been observed watching films while sitting outside the theater in parked cars and in the grass.

The trial court upheld the ordinance as a legitimate exercise of the municipality's police power, and ruled that it did not infringe appellant's First Amendment rights. The District Court of Appeals, First District of Florida, affirmed, 288 So. 2d 260 (1974), relying exclusively on *Chemline, Inc.* v. *City of Grand Prairie*, 364 F. 2d 721 (CA5 1966), which had sustained a similar ordinance.[2] The Florida Supreme Court denied certiorari, three judges

---

regarding the content of the movie, the parties agree that it includes pictures of uncovered female breasts and buttocks.

[2] The only other Circuit Court of Appeals to consider this question reached a contrary result. See *Cinecom Theatres Midwest States, Inc.* v. *City of Fort Wayne*, 473 F. 2d 1297 (CA7 1973).

dissenting. 294 So. 2d 93 (1974). We noted probable jurisdiction,[3] 419 U. S. 822 (1974), and now reverse.

II

Appellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity, see *Miller* v. *California*, 413 U. S. 15 (1973), and thus applies to films that are protected by the First Amendment. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *Jenkins* v. *Georgia*, 418 U. S. 153 (1974). Nevertheless, it maintains that any movie containing nudity which is visible from a public place may be suppressed as a nuisance. Several theories are advanced to justify this contention.

A

Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might offend; rather it singles out films containing nudity, presumably because the lawmakers considered them especially offensive to passersby.

This Court has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts. See, *e. g.*, *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Breard* v. *Alexander*, 341 U. S. 622, 641–645 (1951); *Cohen* v. *California*, 403 U. S. 15 (1971); *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974). See generally Haiman, Speech v. Privacy: Is There A Right Not To Be Spoken To?, 67 N. W. U. L.

[3] A local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U. S. C. § 1257 (2). See *King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100 (1928).

Rev. 153 (1972). Such cases demand delicate balancing because

> "[i]n th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 491 (1975).

Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. See *Kovacs* v. *Cooper*, *supra*; *Cox* v. *Louisiana*, 379 U. S. 536, 554 (1965); *Adderly* v. *Florida*, 385 U. S. 39 (1966). But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. See, *e. g.*, *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Kovacs* v. *Cooper*, 336 U. S., at 97 (Jackson, J., concurring). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970),[4] or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See

[4] *Rowan* involved a congressional statute that permits a person receiving "a pandering advertisement" which he believes to be "erotically arousing or sexually provocative" to instruct the Postmaster General to inform the sender that such mail is not to be sent in the future. The Court upheld the statute, emphasizing that individual privacy is entitled to greater protection in the home than on the streets and noting that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." See *id.*, at 736–738.

Lehman v. *City of Shaker Heights, supra.*[5] As Mr. Justice Harlan cautioned:

> "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively employ a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California,* 403 U. S., at 21.

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." *Rowan* v. *Post Office Dept.,* 397 U. S., at 736. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above,[6] the burden

---

[5] In *Lehman* the Court sustained a municipality's policy of barring political advertisements while permitting nonpolitical advertisements on city buses. The issue was whether the city had created a "public forum" and thereby obligated itself to accept all advertising. While concluding that no public forum had been established, both the plurality and concurring opinions recognized that the degree of captivity and the resultant intrusion on privacy is significantly greater for a passenger on a bus than for a person on the street. See *id.,* at 302–304 (opinion of MR. JUSTICE BLACKMUN), and at 306–308 (DOUGLAS, J., concurring). See also *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467 (1952) (DOUGLAS, J., dissenting).

[6] It has also been suggested that government may proscribe, by a properly framed law, "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Rosen-*

normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen* v. *California*, 403 U. S., at 21. See also *Spence* v. *Washington*, 418 U. S. 405, 412 (1974).

The Jacksonville ordinance discriminates among movies solely on the basis of content.[7] Its effect is to deter

---

feld v. *New Jersey*, 408 U. S. 901, 905 (POWELL, J., dissenting). Cf. *Ginzburg* v. *United States*, 383 U. S. 463 (1966). In such cases the speaker may seek to "force public confrontation with the potentially offensive aspects of the work." *Id.*, at 470. It may not be the content of the speech, as much as the deliberate "verbal [or visual] assault," *Rosenfeld*, *supra*, at 906, that justifies proscription. See *Redrup* v. *New York*, 386 U. S. 767, 769 (1967). In the present case, however, appellant is not trying to reach, much less shock, unwilling viewers. Appellant manages a commercial enterprise which depends for its success on *paying* customers, not on free-loading passersby. Presumably, where economically feasible, the screen of a drive-in theater will be shielded from those who do not pay.

[7] Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. See *Miller* v. *California*, 413 U. S., at 24; *Kois* v. *Wisconsin*, 408 U. S. 229 (1972). In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent exposure laws. See *Roth* v. *United States*, 354 U. S. 476, 512 (1957) (DOUGLAS, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places"). Cf. *United States* v. *O'Brien*, 391 U. S. 367 (1968).

THE CHIEF JUSTICE's dissent, in response to this point, states that "[u]nlike persons reading books, passersby cannot consider fragments of drive-in movies as a part of the 'whole work' for the simple reason that they *see* but do not *hear* the performance, . . ." *Post*, at 4 (emphasis in original). At issue here, however, is not the viewing rights of unwilling viewers but rather the rights of those who operate drive-in theatres and the public that attends these establishments. The effect of the Jacksonville ordinance is to increase the cost of showing films containing nudity. See n. 8, *infra*. In certain circumstances theatres will avoid showing these movies rather than incur the additional costs. As a result persons who want to see such films at drive-ins will be unable to do so. It

drive-in theaters from showing movies containing any nudity, however innocent or even educational.[8] This discrimination cannot be justified as a means of preventing significant intrusions on privacy. The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U. S. 767, 769 (1967). Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.[9]

B

Appellee also attempts to support the ordinance as an exercise of the city's undoubted police power to protect children. Appellee maintains that even though it cannot prohibit the display of films containing nudity to adults, the present ordinance is a reasonable means of protecting minors from this type of visual influence. It is well settled that a State or municipality can

---

is in this regard that a motion picture must be considered as a whole, and not as isolated fragments or scenes of nudity.

[8] Such a deterrent, although it might not result in total suppression of these movies, is a restraint on free expression. See *Speiser* v. *Randall*, 357 U. S. 513, 518–519 (1958). The record does not indicate how much it would cost to block public view of appellant's theater. Such costs generally will vary with circumstances. In one case the expense was estimated at approximately a quarter million dollars. See *Olympic Drive-In Theatre, Inc.* v. *City of Pagedale*, 441 S. W. 2d 5, 8 (Mo. 1969).

[9] We are not concerned in this case with a properly drawn zoning ordinance restricting the location of drive-in theaters or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theaters.

CONCLUSION

The decision herein appealed should be affirmed.

Respectfully submitted,

WILLIAM LEE ALLEN
Counsel of Record

HARRY LOUIS SHORSTEIN
Counsel

1300 City Hall
Jacksonville, Florida 32202

ATTORNEYS FOR APPELLEE

DATED: December 12, 1974.

Proof of service December 12, 1974, by separate instrument.